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No. 83-188

In the Supreme Court of the United States

October Term, 1983

CLAIR OLSEN and GUITAR CITY STUDIOS, INC.,
a Utah corporation,
Petitioners,

vs.

CBS MUSICAL INSTRUMENTS, a division of
Columbia Broadcasting Systems, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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QUESTION PRESENTED

WILL THIS COURT DISMISS A PROVEN PER SE ANTI-TRUST CO-CONSPIRATOR BASED ON AN UNETHICAL MISREPRESENTATION OF THE RECORD?

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NOTE

Authorities previously reproduced and appended for the Court in documents already submitted will not be reproduced again, in the interest of brievity.

I

ARGUMENT

POINT I

THE DEFENDANT CBS' RESPONSE BRIEF IS AN UNETHICAL PORTRAYAL OF THE RECORD IN THIS CASE.

A. *Defendant is wrong in asserting that Petitioners failed to advance their claims of unfair competition in the CBS case.* (CBS Response Brief at Page 6.)

Appellants CBS, 10th Circuit Appeal Brief at pages 13-14 sets forth the unlawful tradename infringement in furtherance of a conspiracy as a significant damage issue. This issue was dismissed in silence in the Progressive case and later by all the lower courts when they failed to make specific findings as required by Fed. R. Civ. P. 52 (a). Petitioners are entitled to consideration of this issue and damages under this Court's mandate in *Hurn v. Oursler*, 289 U.S. 238 (1932). This principle is codified in 28 U.S.C. 1338(b). Additionally the Petitioners' damages on this issue should be considered under the Lanham Trademark Act § 43(a), codified 15 U.S.C. 1125(a) and under the 10th Circuit's holdings in *Big O Tire Dealers v. Goodyear Tire & Rubber Co.*, 561 F. 2d 1365 (10th Cir. 1977). With Petitioners being able to elect to take their damages from any proven co-conspirator. *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981-82). Defendant CBS is a proven co-conspirator. (CBS Response Brief at page D-3. By filing suit against CBS in 1977 prior to any judgment in the Progressive case, Petitioners have elected to take some of their damages from CBS.

B. *Defendant is wrong in asserting that Petitioners have never alleged that the conspiracy issues affecting CBS were not fully and fairly litigated in the Progressive case.* (Response Brief at Page 11.)

Appellants CBS, 10th Circuit Appeal Brief at page 11 and Point VI, pages 27-30, clearly sets forth exactly that argument which Defendant asserts was never raised. The CBS Petition for Certiorari at Appendix C sets forth undisputed evidence which the trial court in the Progressive case refused to hear. That evidence was related to the continuation of the proven conspiracy into the years 1975 and 1976. The refusal of the court to hear this evidence prevented the continuing conspiracy from being fully and fairly litigated in the Progressive case. Thereby placing the lower courts in conflict with this Court's mandate in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971), where in it is clear that collateral estoppel cannot be used to deprive a litigant of fully and fairly presenting actionable issues. Our lower court's holding barring Petitioner from prosecution of continuing conspiracy by collateral estoppel are also in conflict with this Court's controlling mandate in *Lawlor v. National Screen Service Corporation*, 349 U.S. 322 (1955). See the CBS Petition for Certiorari at POINT I for argument.

C. *Defendant is wrong in asserting the damage period is the same in the CBS and Progressive cases.* (CBS Response Brief, POINT II.)

The October 15, 1982 Transcript reads:

> THE COURT: In any event, I haven't heard Mr. Wells say there are any conspirators other than Fender. I don't see any purpose in proceeding in the Melody Shop Claim.
>
> MR. WELLS: The conspirators were Progressive and Herger. The reason the Melody Shop is important is because if CBS had allowed us to acquire the Melody Shop with its franchises intact, then we would have had instruments in Utah and could have competed against them and would have destroyed the basis for their price fixing.

(T. at 16). Clearly both district courts in the Progressive and the CBS case refused to hear evidence of continuing conspiracy depriving Petitioners of fully and fairly litigating his claims even thought a per se conspiracy was proved in the Progresive case for years 1971-1974. See Progressive case, Petition for Certiorari, Appendices A & B.

The best evidence this Court could have of the continuation of the anti-competitive effect proven in the Progressive case is the undisputed business records of CBS. See CBS Petition for Certiorari at Appendix D. The appendix clearly shows that all competitors had been eliminated in Utah to protect the conspiracy. It also shows that no competitors were restored to the market until 1976. The dismissal of CBS without examination for economic harm of the continued anti-competitive effect during the years 1975 and 1976 is in conflict with this Court's controlling mandate in *Lawlor v. National Screen*, supra and *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977). In dismissing CBS the lower courts have ignored this Court's man-

date in the above cited cases and have replaced the rule of reason standard in deciding anti-trust law with an assumption of reasonableness.

The undisputed continuing anti-competitive market effect in the years 1975 and 1976, the attempt by Petitioners to acquire the Melody Shop in 1976, which held the existing CBS franchise, and the refusal of CBS to deal with Petitioners if they acquired the Melody Shop, clearly demonstrates the continuing efforts of CBS to perpetuate the conspiracy by protecting Progressive from price competition. Contrary to the assertions of CBS, these facts show the present action contains a new and different damage period from that decided in Progressive. CBS has confused the courts and has gained dismissal by citing language from the record which relates to Petitioners' claims that they are entitled to more damages than were awarded in the Progressive case. Petitioners' damage claims can be summarized in three specific areas. 1) Damages should be more than were awarded in the Progressive case. See POINT III, Progressive Petition for Certiorari. 2) Multiple damages for multiple injuries should be awarded. See Progressive Petition for Certiorari at page 22. 3) Petitioners claim a continuing conspiracy with CBS and a new and different damage period at least for the years 1975-1976. POINT III CBS Petition for Certiorari.

D. *The Defendant CBS does not oppose, defend, or even dispute that Petitioners have been denied statutory due process of law.* (CBS Response Brief, page 12.)

The CBS Response Brief at page 12 states that Petitioners constitutional arguments are "utterly unintelligible."

The Defendant language thereby disparages the competency of this Court, the Congress of the United States, the Federal Statutes and the 5th and 14th Amendments to the Constitution. The position of CBS infers that this Court's mandate in *Hurn v. Oursler*, supra, the Federal Statutes, supra, as framed by Congress, and the 5th and 14th Amendments to the Constitution as framed by Congress and ratified by the states are incomprehensible. If the Defendant really believes its argument, this fact itself is a special and important reason under this Court's Rule 17 to grant the writ of Certeriorari.

CONCLUSION

For all of the foregoing reasons CBS should be held accountable for its participation in a per se illegal conspiracy and should not be dismissed. Petitioners' argument can be verified as true if and when they are allowed to certify and forward the record below.

Respectfully submitted,

ORIGINAL SIGNED BY:

By Lowell V. Summerhays

Lowell W. Summerhays

SUMMERHAYS, WELLS & CLAWSON

By .....

Edward T. Wells

By .....

W. Andrew Clawson

Attorneys for Petitioner

Dated Sept. 16, 1983.

CERTIFICATE OF SERVICE

The undersigned a member of the bar of the United States Supreme Court, hereby certifies that three true and correct copies of the above and foregoing Reply Brief of Petitioners Clair Olsen and Guitar City Studios, Inc. in Reply to Respondent CBS Brief in opposition to Petitioners' Petition for Certiorari have been either personally delivered or placed postage prepaid, first class in the United States Mail, to the following:

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DATED this SEP 16 1983 day of September, 1983.

ORIGINAL SIGNED BY:
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